UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BRENDA FOSTER, Plaintiff	)	
v.	)	CIVIL NO. 88-0064 P
LOUIS SULLIVAN, Secretary, U.S. Department of Health and Human Services, Defendant	)	

REPORT AND RECOMMENDED DECISION ON REMAND

This court has decided that the Secretary properly considered the plaintiff's complaints of pain and has therefore rejected my original recommended decision in this Supplemental Security Income case. The case has been remanded to me for consideration of the remaining issues the plaintiff has raised on appeal. The plaintiff argues that the Administrative Law Judge improperly decided that the plaintiff's impairments do not meet or equal Listing 1.05A of the Listing of Impairments, 20 C.F.R. ' 404, Subpart P, App. 1, and that the Secretary has not met his burden of showing that the plaintiff has the residual functional capacity to perform sedentary work.

As summarized in this court's order and in my previous recommended decision, the Administrative Law Judge made the following findings: that the plaintiff has not engaged in substantial gainful activity since May 1984, Finding 1, Record p. 22; that the plaintiff has "severe degenerative arthritis and mild carpal tunnel syndrome," but that this impairment does not meet or equal an Appendix 1 Listing, Finding 2, Record p. 22; that the plaintiff's testimony concerning her symptoms and degree of impairment is exaggerated and not credible, Finding 3, Record p. 22; that the plaintiff "has the residual functional capacity to perform the physical exertion[al] and nonexertional requirements of work

except for inability to lift and carry more than 10 pounds, bend or stoop frequently, or stand, walk or sit for prolonged periods without interruption," Finding 4, Record p. 22; that the plaintiff "is unable to perform her past relevant work as a home health worker, carpenter, or commercial photographer," Finding 5, Record p. 22; that the plaintiff's "residual functional capacity for the full range of sedentary work is reduced by the need to alternate standing and sitting during the work day," Finding 6, Record p. 22; that, given the plaintiff's age (44), education (high school), work experience, and exertional capacity for sedentary work, Rule 201.20[1] of Appendix 2 to Subpart P, 20 C.F.R. ' 404 (the Grid) would direct a conclusion of "not disabled," Findings 7, 8, 9, 10, Record p. 22; and that, using the Grid as a framework, the plaintiff is not disabled because her "capacity for the full range of sedentary work has not been significantly compromised by her additional nonexertional limitations," Finding 11, Record p. 22. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final determination of the Secretary.[2]

In reviewing the decision of the Secretary, the standard is whether the determination made is supported by substantial evidence. 42 U.S.C. ' 405(g);

[1] The Administrative Law Judge appears to have mistakenly cited Rule 201.20 of Appendix 2 to Subpart P, 20 C.F.R. ' 404 (the Grid) instead of Rule 201.22. Rule 201.20 covers persons of the plaintiff's age with transferable skills with less than a high school education. Rule 201.22 covers persons with the plaintiff's age, education, and work experience. Both rules direct a conclusion of not disabled.

[2] The Appeals Council did consider evidence submitted after the hearing date but concluded that this additional evidence did not establish any greater loss of function than the evidence which had been available to the Administrative Law Judge.

Lizotte v. Secretary of Health & Human Services, 654 F.2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. Richardson v. Perales, 402 U.S. 389, 401 (1971); Rodriguez v. Secretary of Health & Human Services, 647 F.2d 218, 222 (1st Cir. 1981).

The plaintiff argues that the Secretary failed to properly determine whether her impairments meet or equal Listing 1.05A of Appendix 1 to Subpart P, 20 C.F.R. ' 404. This Listing includes:

> A. Arthritis manifested by ankylosis or fixation of the cervical or dorsolumbar spine at 30N or more of flexion measured from the neutral postion [sic], with X-ray evidence of:
>
> 1. Calcification of the anterior and lateral ligaments; or
>
> 2. Bilateral ankylosis of the sacroiliac joints with abnormal apophyseal articulations.

1.05 Appendix 1 to Subpart P, 20 C.F.R. ' 404. The plaintiff has the burden of proving that her impairment meets or equals a listed impairment. Dudley v. Secretary of Health & Human Services, 816 F.2d 792, 793 (1st Cir. 1987). To meet a listed impairment, the plaintiff must have the specific medical findings, which consist of symptoms, signs, and laboratory findings, shown in the Listing for that impairment. 20 C.F.R. '' 416.925(d), 416.928. To be equivalent to a listed impairment, the plaintiff's medical findings must be "at least equal in severity and duration to the listed findings." 20 C.F.R. ' 416.926(a). To determine whether an impairment equals a listed impairment, the Secretary will "compare the symptoms, signs, and laboratory findings about [the] impairment(s), as shown in the medical evidence . . . , with the medical criteria shown with the listed impairment." Id. Determinations of equivalence must be based on medical evidence only, and must be supported by medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. ' 416.926(b).

The Administrative Law Judge found that the plaintiff has severe degenerative arthritis. Finding 2, Record p. 22. James F. Findlay, D.O.

examined the plaintiff and diagnosed her as having ankylosing spondylitis. Record p. 140. X-ray reports of the lumbar spine by the roentgenologist M.A. Kellett, M.D. show "marked narrowing of the L-5 S-1 intervertebral space" and "a small accessory center of ossification on the anterior superior margin of L-5 and . . . some degenerative changes within the articular facettes." Record p. 130. Although the record indicates that the first part of Listing 1.05A is met, there is no x-ray evidence showing calcification of ligaments or ankylosis of the sacroiliac joints.[3] Dr. Findlay reports that "there is no marked spondylosis of the sacroiliac joints of the lumbar spine." Record p. 140.

The plaintiff argues that the Administrative Law Judge erred by failing to make specific findings to support his conclusion that the plaintiff has no impairment that meets or equals a listed impairment. See Finding 2, Record p. 22. Although the plaintiff cites Kinney v. Heckler, 608 F. Supp. 454 (D. Me. 1985), in that case additional findings were required because it was apparent that the testifying medical advisor had not given proper consideration to the plaintiff's symptoms, as required by 20 C.F.R. ' 404.1526, in rendering his opinion as to whether the plaintiff's impairment equaled the Listings. Similarly, in Verrill v. Heckler, 607 F. Supp. 580 (D. Me. 1985), more specific findings were necessary because the Administrative Law Judge's ultimate finding of nonequivalence was not supported in the record by any analysis or subsidiary findings making clear that it was not derived solely by implication from his finding that the claimant's impairments did not meet the Listings. Moreover, in that case the evidence clearly indicated that the claimant's impairments came close to a listed impairment. Id. at 582.

In contrast, although additional analysis might have been helpful, in this case no additional findings or analysis is necessary to show that the evidence

[3] The record contains evidence of pain in the sacroiliac joints, see, e.g., Record pp. 20, 138, 164, 167, but the Listing requires x-ray evidence of ankylosis of the sacroiliac joints.

supports the Administrative Law Judge's conclusion that the plaintiff's impairment does not meet or equal a listed impairment. The plaintiff has not submitted any x-ray evidence of either calcification of ligaments or bilateral ankylosis of the sacroiliac joints.

A determination that an impairment equals the Listings requires medical expertise. Social Security Ruling 83-19 at 93 (West Supp. 1988). Although the Administrative Law Judge did not consult a medical advisor to determine whether the plaintiff's impairments equal a Listing, the Administrative Law Judge may rely on the determination of equivalency by the physician signing the state agency's initial or reconsidered disability determination unless, in the opinion of the Administrative Law Judge, additional evidence may change that determination or the medical evidence suggests that a judgment of equivalency may be reasonable. See id. Here the record shows that in the August 11, 1986 reconsideration determination by the state agency, a physician determined that the plaintiff's impairment did not meet or equal the Listings. Record p. 95. Although the plaintiff presented additional medical evidence concerning her arthritis after this date, including a report dated February 24, 1987 from Charles Serritella, D.C., Record p. 164, a report dated March 9, 1987 from Robert A. Sylvester, M.D., Record pp. 167-68, and a report dated April 6, 1987 from Douglas M. Pavlak, M.D., Record pp. 170-73, these do not provide additional information concerning calcification of ligaments or ankylosis of the sacroiliac joints.[4] I conclude that the Administrative Law Judge, without additional findings and without additional expert consultation, could have reasonably accepted the state agency physician's determination that the plaintiff's impairments did not equal a Listing.

[4] Although these additional reports provide evidence of pain in the area of the sacroiliac joints, Record pp. 164, 167, 171, the reconsideration determination was based on a similar finding by Dr. Findlay on physical examination of "marked tenderness over the sacroiliac joint," Record pp. 95, 138.

In addition, the plaintiff argues that the Secretary erred in finding her capable of performing sedentary work because she testified she is unable to sit for more than ten to fifteen minutes at a time. Record p. 52. Since the Secretary determined that the plaintiff cannot perform her past relevant work and thus proceeded to Step Five of the sequential evaluation process, the burden is on the Secretary to establish the plaintiff's ability to do other work in the national economy. 20 C.F.R. ' 416.920(f); Bowen v. Yuckert, 107 S. Ct. 2287, 2294 n.5 (1987); Goodermote v. Secretary of Health & Human Services, 690 F.2d 5, 7 (1st Cir. 1982). This means that the record must contain positive evidence in support of the Secretary's findings regarding not only the relevant vocational factors but also the plaintiff's residual functional capacity to perform work other than her past relevant work. Rosado v. Secretary of Health & Human Services, 807 F.2d 292, 294 (1st Cir. 1986); Lugo v. Secretary of Health & Human Services, 794 F.2d 14, 16 (1st Cir. 1986).

The Administrative Law Judge found that the plaintiff cannot "sit for prolonged periods without interruption," Finding 4, Record p. 22, and that her "capacity for the full range of sedentary work is reduced by the need to alternate standing and sitting during the work day," Finding 6, Record p. 22. Under 20 C.F.R. ' 416.967(a) and Social Security Ruling 83-10, sedentary work requires the ability to sit for a total of about six hours and to walk or stand for a total of about two hours out of an eight-hour day. Although the plaintiff claims that she cannot engage in any sedentary work because of her need to alternate sitting and standing, Social Security Ruling 83-12 provides guidelines applicable when an individual must alternate sitting and standing. This ruling states that:

> Such an individual is not functionally capable of doing either the prolonged sitting contemplated in the definition of sedentary work (and for the relatively few light jobs which are performed primarily in a seated position) or the prolonged standing or walking contemplated for most light work. (Persons who can adjust to any need to vary sitting and standing by doing so at breaks, lunch periods, etc., would still be able to perform a defined range of work.)

> There are some jobs in the national economy -- typically professional and managerial ones -- in which a person can sit or stand with a degree of choice. . . . Unskilled types of jobs are particularly structured so that a person cannot ordinarily sit or stand at will. In cases of unusual limitation of ability to sit or stand, a VS [vocational specialist] should be consulted to clarify the implications for the occupational base.

Social Security Ruling 83-12 at 61-62 (West Supp. 1988).

Several opinions of the First Circuit Court of Appeals address the situation when a claimant must alternate sitting and standing. If a claimant needs to interrupt sitting with frequent intervals of rest, she may not be capable of sedentary work. DaRosa v. Secretary of Health & Human Services, 803 F.2d 24, 26 (1st Cir. 1986). Likewise, someone who cannot remain seated "most of the day" and who must "often interrupt [her] sitting with standing for significant periods of time" is not capable of sedentary work. Thomas v. Secretary of Health & Human Services, 659 F.2d 8, 10-11 (1st Cir. 1981). See also Benko v. Schweiker, 551 F. Supp. 698, 704 (D.N.H. 1982) ("a conclusion that a claimant may perform sedentary work must be predicated upon a finding that the claimant can sit most of the day, with occasional interruptions of short duration").

The Secretary did not determine, and the evidence does not show, whether the plaintiff needs to interrupt sitting for significant periods each day or whether brief interruptions would enable her to sit for most of the day. Nevertheless, in accordance with Social Security Ruling 83-12, the Administrative Law Judge consulted a vocational expert, who testified that there are a number of sedentary jobs that the plaintiff can perform, given her age, education and skills, that allow her to sit or stand at will. Record pp. 60-63. This expert testimony provides substantial support for the decision that the plaintiff's need to alternate sitting and standing can be accommodated in a number of sedentary jobs, regardless of the required length of interruptions in sitting.

The plaintiff contends that the Administrative Law Judge erred in ignoring the vocational expert's uncertainty about a worker's ability to sit or stand at

will in the shoe industry jobs mentioned. The record shows, however, that when asked whether these jobs allowed the option of sitting or standing at will, the vocational expert answered, "They would be at an individual work station. You would -- I assume you could --." Record p. 63. The Administrative Law Judge then asked him again, "You could either sit or you could stand, and you could alternate that position --," and the vocational expert responded, "Yes." Id. I conclude that the Administrative Law Judge could reasonably interpret this answer as expressing certainty that the jobs allowed a worker to sit or stand at will.

Finally, the plaintiff argues that the decision that she can perform sedentary work is incorrect because the hypothetical question posed to the vocational expert did not include the plaintiff's alleged restrictions in the use of her hands. However, the Administrative Law Judge found the plaintiff's claims of severe pain and severe nonexertional restrictions were not credible, and this credibility finding was upheld by this court.

Accordingly, I recommend that the Secretary's decision be AFFIRMED.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

DATED at Portland, Maine, this 20th day of June, 1989.

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David M. Cohen
United States Magistrate